In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 857

DAVID GEORGE GWYTHER and KIP DALLEN MORGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1970. A petition for rehearing was denied on September 16, 1970 (Pet. App. B). The

petition for a writ of certiorari was filed on October 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the judge instructed the jury that it must find that petitioners' interference with the administration of the Selective Service was by force and violence to justify a conviction under 50 U.S.C. App. 462(a), petitioners may attack the statute as unconstitutional on its face for overbreadth because it contains a prohibition, not applied to them, on interference "otherwise" than by force and violence.

2. Whether the indictment, which alleged that petitioners interfered with the administration of the system by disrupting official action and stopping a meeting, was fatally defective for failing to allege that the interference was by force and violence, where the judge charged that proof of force and violence was necessary to conviction.

STATUTE INVOLVED

Section 12(a) of the Military Selective Service Act of 1967, as amended (50 U.S.C. App. (Supp. V) 462 (a)), provides in pertinent part:

> [A]ny person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title * * * or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses,

shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Oregon, petitioners were convicted of two counts of having knowingly and wilfully hindered and interfered with the administration of the Selective Service System in violation of 50 U.S.C. App. 462(a) and one count of conspiracy to commit the offense. They were sentenced to concurrent prison terms of two years. The court of appeals affirmed.

The indictment on which petitioners were tried charged, as to each substantive offense, that defendants "did knowingly and wilfully hinder and interfere" with the administration of the Selective Service Act in that they entered a particular draft board office and "while there interrupted and disrupted official actions of Selective Service System personnel and obstructed, restrained, and stopped a meeting and official action of this local Board." See Pet. App. 22-23.

The evidence, summarized in the opinion below (Pet. App. 18), showed that petitioners and others pushed their way into two different draft boards and occupied the premises to conduct mock trials of board members and employees. Employees of the draft board were physically restrained, prevented from withdrawing and delayed in calling the police.

At the request of petitioners, the judge charged the jury that it must find that the interference with the draft boards was by force or violence in order to convict petitioners.[1]

ARGUMENT

1. Despite the fact that the jury was instructed that it had to find force or violence to convict, petitioners attack the constitutionality of Section 12(a) on its face because the statute prohibits interference "otherwise" than by force or violence. The court below properly held that, in view of the instructions, the issue raised by petitioners is not presented by this case since the "or otherwise" clause was not applied to them. *United States* v. *Raines*, 362 U.S. 17. See, also, *Yates* v. *United States*, 354 U.S. 298; *Dennis* v. *United States*, 341 U.S. 494; Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 899-901, 918-923. The doctrine that a statute may be attacked on its face for overbreadth is inapplicable to cases such as this one where the part of the statute under attack is not involved at all.

2. Although the indictment did not allege that the interference was "by force or violence," it did set forth the specific acts with which defendants were charged. Petitioners, who themselves urged the court

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[1] A prior indictment had charged that petitioners had interfered with the administration of the system "by force and violence and otherwise." The district court struck the "and otherwise" language from the indictment (Pet. 5). The second indictment made no reference to "force and violence and otherwise" but was identical in all other respects.

to construe the indictment as charging interference only by force or violence and who were advised by the trial judge on the second day of trial that he would so instruct (See Pet. 6-7), were adequately apprised of the charges against them. They were thus able to prepare their defense and were protected against double jeopardy. See *United States* v. *Debrow*, 346 U.S. 374. The indictment, therefore, was sufficient.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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